Nos. 06-1195 and 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE PETITIONS FOR REHEARING

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Petitioners ask this Court to reconsider its order, issued just over two months ago, denying review of the D.C. Circuit's decision in *Boumediene* v. *Bush*, 476 F.3d 981, cert. denied, 127 S. Ct. 1478 (2007). As petitioners themselves recognize (Pet. 2), that is "an exceptional request."[1] What is more, petitioners implicitly concede that they cannot show any "intervening circumstances" or new "substantial grounds" since the Court's denial of certiorari that would warrant reconsideration under Supreme Court Rule 44.2. Instead, their request

[1] Unless otherwise noted, all references to "Pet." are to the rehearing petition filed in No. 06-1195.

is based solely on speculation that they "will *soon* be within [the] categories" of cases covered by Rule 44.2. Pet. 2 (emphasis added). Such speculation provides no basis for rehearing.

Indeed, if anything, events since the Court denied certiorari confirm that petitioners will receive an opportunity to press their claims in the D.C. Circuit. Petitioners are currently pursuing their statutory rights in the D.C. Circuit under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Title X, 119 Stat. 2739, which is precisely what was expected. See, *e.g.*, *Boumediene*, 127 S. Ct. at 1478 (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari). And since this Court denied certiorari, the D.C. Circuit has acted with dispatch and heard oral argument in key cases that are expected to establish the framework for processing claims under the DTA. See *Bismullah* v. *Gates*, No. 06-1197, and *Parhat* v. *Gates*, No. 06-1397 (argued May 15, 2007). Petitioners will have ample opportunity to raise any claims challenging their detention under the DTA and, if necessary, may seek review in this Court of the D.C. Circuit's final judgment.

Nor is there any basis for this Court to grant petitioners' alternative request to defer consideration of this petition and simply shelve these cases on the Court's docket. This Court's rules explicitly discourage the filing of rehearing petitions for purposes of "delay." Sup. Ct. R. 44.2. And deferring consideration of the petition would only interfere with the litigation now underway in the D.C. Circuit on the scope of the review afforded by the DTA by creating confusion as to how the lower courts are to proceed. If, following the exhaustion of their DTA remedies, the detainees do not secure the relief they seek, they may promptly petition this Court for review—as they did in the days following *Boumediene*.

1. The grant of a petition for rehearing from a denial of certiorari is an extraordinary remedy, warranted only where

there have been "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented." Sup. Ct. R. 44.2. As petitioners acknowledge (Pet. 2), neither basis for rehearing is currently present here.

As explained in respondents' opposition to the petitions for a writ of certiorari, the judgment of the court of appeals is correct and does not warrant this Court's review. See Br. in Opp. 7-30. On April 2, 2007, this Court denied certiorari. See *Boumediene*, 127 S. Ct. at 1478. Two Justices noted that the denial of certiorari was consistent with the "traditional rules governing [the Court's] decision of constitutional questions" and the Court's practice of "requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus." *Ibid.* (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari) (citations omitted). On April 30, 2007, this Court denied another petition seeking review of the same D.C. Circuit decision. See *Hamdan* v. *Gates*, 127 S. Ct. 2133.

As petitioners recognize, no "intervening circumstances" or other "substantial grounds" supporting their request have arisen in the last two months. See Pet. 2 (arguing that events "in the coming months" may make rehearing appropriate). That should be fatal to the petition, as this Court's rules recognize that rehearing is "limited" to those two factors. See Sup. Ct. R. 44.2.

Nothing material has changed since the Court denied the certiorari petition. No new or conflicting decision has been issued by any court of appeals. See *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30, 34 n.1 (1929). Nor is there any new or controlling precedent from this Court, see *Friend* v. *United States*, 517 U.S. 1152 (1996), or even any new pending case that raises the same issue, see *United States* v. *Ohio Power Co.*, 353 U.S. 98, 98-99 (1957). Indeed, as explained below, the events that have transpired in the D.C. Circuit since this

Court denied certiorari—such as the court's expedited consideration of *Bismullah* and *Parhat*—only underscore that the D.C. Circuit is already moving promptly to give effect to the review established by the DTA. Once this Court issues a ruling, there is a substantial public interest in the finality of that ruling, and that interest can be overcome only by the most compelling changed circumstances. No such circumstances are present here.

2. Petitioners suggest (Pet. 2) that "the pursuit of DTA remedies in the coming months by petitioners and other detainees constitutes an 'intervening circumstance[] of a substantial or controlling effect' and will also give rise to 'other substantial grounds not previously presented.'" That argument lacks merit.

Some of the petitioners, as well as more than 90 other detainees, have now filed petitions for review in the D.C. Circuit, thus initiating proceedings under the DTA to review the final determinations of their Combatant Status Review Tribunals (CSRTs). But that fact does not remotely qualify as an "intervening circumstance[]" or "other substantial ground[]" warranting rehearing of the Court's denial of certiorari. On the contrary, when this Court denied certiorari, it anticipated that petitioners and the other Guantanamo detainees would file such petitions in the D.C. Circuit under the DTA. See *Boumediene*, 127 S. Ct. at 1478 (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari) (stating that any review should await exhaustion of remedies under the DTA). Indeed, the government emphasized that prospect as a principal reason to deny review. See Br. in Opp. 12-19.

Petitioners' "pursuit of DTA remedies" is not by any stretch a circumstance that would favor either granting certiorari or reconsidering the previous denial of certiorari. It is the logical (and desirable) consequence of this Court's decision to deny certiorari.

3. Petitioners' speculation that review under the DTA in the D.C. Circuit will be ineffective or deficient is likewise not a ground for this Court to grant rehearing. Petitioners voiced precisely the same concerns in their certiorari petitions. See 06-1195 Pet. for Cert. 18-21; 06-1196 Pet. for Cert. 19-24.[2] Petitioners are unable to identify concrete examples demonstrating that any of those fears has materialized in their DTA cases. And there is certainly no basis to presume that the D.C. Circuit will not faithfully discharge its Article III duties in processing their claims.

a. In *Bismullah* and *Parhat*, the D.C. Circuit is currently considering—on an expedited basis—key threshold issues that will govern pending and future DTA proceedings. Those issues concern counsel access to classified materials and to the detainees, and the availability of discovery. The D.C. Circuit has already received full briefing and held oral argument in *Bismullah* and *Parhat* on May 15, 2007. The D.C. Circuit is fully aware of the importance of these cases and the need for prompt guidance on these threshold issues.

In anticipation of a decision in *Bismullah* and *Parhat*, the D.C. Circuit has scheduled briefing and oral argument on the merits of the first DTA petition filed, with petitioner's opening brief due on July 16, 2007, and argument set for September 17, 2007. See Order, *Paracha* v. *Bush*, No. 05-5194 (D.C. Cir. Apr. 9, 2007). It has instructed the parties to "take into account" its coming disposition of *Bismullah* and *Parhat*.

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[2] Petitioners' arguments regarding the supposed inadequacy of DTA review largely repeat the arguments raised in their certiorari petitions. Compare, *e.g.*, Pet. 4 (arguing that DTA procedures will "prevent Petitioners from obtaining * * * the ultimate remedy of release"), with 06-1195 Pet. for Cert. 20 ("A further deficiency in section 1005(e)(2) is that it does not expressly authorize the court of appeals to discharge a prisoner."), and Pet. 3 ("The government asserts that the DTA prohibits access by detainees to relevant government documents outside the CSRT record."), with 06-1195 Pet. for Cert. 18-19 ("[T]he DTA, as interpreted by the government, artificially constrains the 'record' forming the basis of petitioners' detention.").

Ibid. The court is expected to issue briefing schedules in the near future for the other pending DTA cases.

Moreover, rehearing is not necessary in order to preserve this Court's ability to review the adequacy of DTA remedies. In the event that petitioners receive adverse decisions in their DTA cases, they may then seek review of those decisions in this Court. Petitioners "expect the government to contend that this Court does not have jurisdiction to review a decision by the court of appeals in a DTA case." Pet. 7. That expectation is ill-founded. The D.C. Circuit's decision, like any other court of appeals decision, will be reviewable in this Court under 28 U.S.C. 1254(1).

b. Petitioners suggest (Pet. 4) that pursuit of DTA remedies is futile because there is no decision the D.C. Circuit can reach in *Bismullah* and *Parhat* that would result in adequate proceedings to review their detention. But litigants do not have the option of bypassing proceedings in the lower courts simply because they believe they will not get what they want. In any event, pursuit of DTA remedies is by no means futile.

Even if the D.C. Circuit adopts the DTA procedures advocated by the government—which, of course, is uncertain—review under the DTA would still permit petitioners to meaningfully challenge their detention. The DTA specifies that the court of appeals may review a final CSRT decision to determine whether it "was consistent with the standards and procedures specified by the Secretary of Defense," and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C), 119 Stat. 2742. That includes review of whether the CSRT's status determination is "supported by a preponderance of the evidence." DTA § 1005(e)(2)(C)(i), 119 Stat. 2742. Thus, petitioners may raise challenges to their enemy combatant status or procedural objections to the CSRT in the context of their

DTA proceedings before the D.C. Circuit, and ultimately in this Court, if necessary.[3]

Petitioners contend (Pet. 1, 4) that the D.C. Circuit is likely to establish procedures that will prevent petitioners from communicating with counsel, call for the destruction of classified material, and preclude any relief other than remand for a new CSRT, where appropriate. But that is pure speculation and, in any event, as explained fully in the government's briefs to the D.C. Circuit in *Bismullah* and *Parhat* (at 28-32, 41-50), the DTA procedures urged by the government would provide private attorneys the right to visit their clients at the secure military base, use a legal mail system, and access relevant records, including classified national security information. Those steps go well beyond any constitutional or statutory minimum, and they will enhance the ability of both the court of appeals and this Court to review the CSRT determinations.[4]

Moreover, contrary to petitioners' argument (Pet. 4), the government's proposed procedures in no way prevent petitioners from being released. If the D.C. Circuit determines that the CSRT committed legal error, a remand would be the appropriate remedy. Such a remand could lead the CSRT to enter a finding that the detainee is not an enemy combatant.

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[3] The DTA procedures also permit detainees to present new evidence to the Defense Department relating to their enemy combatant status. See DTA § 1005(a)(1) and (3), 119 Stat. 2740-2741.

[4] In addition, by letter to the D.C. Circuit on June 8, 2007, the government explained that the provision in its proposed protective order regarding destruction of documents containing classified information after the termination of the cases will not endanger any future record review of petitioners' detention. The government explained that it will maintain records of material filed in court and served on counsel for the government, and that the protective order provision does not apply to Department of Defense records, including records generated during the CSRT process. The government further explained that it would not seek destruction of materials in concluded district court cases covered by the habeas protective order where a DTA petition has been brought in the court of appeals.

Similarly, if the Department of Defense determines that new evidence presented by the detainee warrants a new CSRT, the new CSRT could issue a final decision that the individual is not an enemy combatant. To date, all individuals who have been found to be no longer enemy combatants have been released by the Department of Defense. See Br. in Opp. 19 n.6.

4. Petitioners alternatively ask (Pet. 5) the Court to defer consideration of their motion until they have exhausted their remedies under the DTA. This Court's rules explicitly discourage the filing of rehearing petitions for "delay," Sup. Ct. R. 44.2, and there is no reason to delay giving effect to the Court's denial of certiorari in these cases.

This Court itself has occasionally delayed consideration of rehearing petitions, but only where there has been an obvious justification, such as the pendency in this Court of another case raising the same issues. See, *e.g.*, *Florida* v. *Rodriguez*, 461 U.S. 940 (1983); *United States* v. *Ohio Power Co.*, 353 U.S. 98 (1957). No comparable situation is presented here. Likewise, as petitioners point out (Pet. 6 & n.2), courts of appeals have occasionally deferred consideration of rehearing petitions when a case involving the same issues is pending in *this Court*. But there is no reason for this Court to defer consideration of a petition for rehearing pending a decision from an *inferior* court.

Petitioners contend (Pet. 5) that deferring consideration of their rehearing petitions is necessary because *Boumediene* is the "optimal vehicle" for this Court's review of the underlying issues. But petitioners' alleged injury would flow not from *Boumediene*, but from a future court of appeals decision regarding the standards and procedures applicable to pending and future DTA cases, which *Boumediene* did not address. *Boumediene* therefore cannot be the "optimal" vehicle for this Court's review of the issues concerning DTA cases. In addition, *Boumediene* did not consider the application of the DTA to a claim filed under the DTA. This Court's review of the

questions presented would benefit from concrete facts illuminating the review afforded by the DTA.

Petitioners further argue (Pet. 8-9) that deferring consideration is appropriate because, if they are correct both that they have constitutional habeas rights and that DTA procedures are an inadequate substitute for a habeas remedy, their ability to seek prompt habeas relief would be frustrated if they had to start over after the DTA review process concludes. But in reviewing a DTA case, this Court can address whether petitioners have any applicable constitutional rights. This Court's ruling in regard to such rights, if favorable to the detainee, may provide a basis for petitioners to file habeas cases at that time, and those cases could be expedited if appropriate under the law applicable at that juncture.

In addition, petitioners argue (Pet. 9-10) that deferral of their petitions is necessary to preserve their ability to communicate with counsel and to protect habeas materials from destruction. As explained above, however, the counsel-access issue is currently pending before the D.C. Circuit, and even if the D.C. Circuit accepts the government's proposed procedures for DTA cases, petitioners' concerns are unfounded. The amended proposed protective order permits counsel to visit the detainees, with no limit on the number of visits. It also provides counsel access to a legal mail system that maintains attorney-client confidentiality.

Finally, if this Court chooses to defer consideration of the petitions, it will create confusion in the D.C. Circuit and district courts as to how they are to proceed with the numerous actions filed by detainees and in all likelihood will invite more unusual filings in this Court, effectively putting this Court in the role of special master over the detainee litigation while the cases are considered by the D.C. Circuit. Many of the habeas corpus cases brought by the detainees are still pending in district court, despite the clear language of *Boumediene* that district courts lack jurisdiction over those actions.

Moreover, the D.C. Circuit has yet to issue the mandate in *Boumediene*. As a result, both the habeas cases and the DTA cases are pending simultaneously, and each set of cases may be governed by separate orders or other requirements, resulting in potentially conflicting obligations. If this Court defers consideration of the petitions, this double-track litigation will likely continue, with a third track likely in the form of new filings in this Court, causing increased burdens on the parties and the courts, in direct contravention of Congress's intent in enacting the DTA and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

Conversely, denying rehearing will help to eliminate this confusion and put the focus on the processing of DTA claims in the D.C. Circuit, after which detainees may seek review in this Court on a fully developed record as to the review afforded by the DTA. In all events, all parties to the litigation would benefit from a prompt disposition of the rehearing request. To that end, the government has filed this response early.

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The petitions for rehearing should be denied.

Respectfully submitted.

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